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August 12, 2010

Informal Opinion 2010-INF-0812-5

David G. Lambert
Civil Division Chief
Office of the Cuyahoga County Prosecuting Attorney

Dear Mr. Lambert:

On April 26, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion. You stated that, in August 2006, the Board of County Commissioners (Board) of Cuyahoga County (County) established the Cuyahoga Regional Energy Development Task Force (Task Force) to explore the potential for developing wind-generated electricity in Lake Erie.

The Board appointed the County Prosecutor, due to his experience in the area of renewable energy and economic development, to serve as the Chair of the Task Force. The work completed by the Task Force led to the creation of the Lake Erie Energy Development Corporation (Corporation) an Ohio nonprofit corporation comprised of the County, Lorain County, the City of Cleveland, the Cleveland Foundation, and the Northeastern Ohio Technology Coalition. A request to the Internal Revenue Service for determination that the Corporation is entitled to 501(c)(3) nonprofit status was pending at the time of your request.

You asked whether the Ethics Law and related statutes prohibit the County Prosecutor from serving, in his official capacity, as the County's representative on the Corporation's Board of Directors. You stated that you are familiar with the Ethics Commission's advisory opinions considering whether public officials and employees can serve on the boards of nonprofit corporations in their "official capacity" as representatives of their public agencies. However, you stated that you were unaware of a situation where the public official or employee serving in such a position was an independently elected official.

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Brief Answer

As explained below, if the Prosecutor were to serve on the Corporation's Board of Directors, he would have an irreconcilable conflict of interest because he is required to act with objectivity and independence of judgment while performing his statutorily mandated public duties *as the County Prosecutor* on matters that affect the Corporation and its relationships with the County. Therefore, the Prosecutor cannot serve on the Corporation's Board of Directors.

Having an Interest in a Public Contract—R.C. 2921.42(A)(4)

A county prosecutor is a public official subject to the prohibitions in R.C. 2921.42(A)(4), which provides that no public official shall knowingly:

Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the public official is connected.

R.C. 2921.01(A) and Ohio Ethics Commission Advisory Opinion No. 83-009.

A "public contract" is the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of any public entity. R.C. 2921.42(I)(1)(a) and (b). Courts have upheld the Ethics Commission's holding that a political subdivision's purchase or acquisition of community and economic development services, through the use of loans, grants, or other similar programs or incentives, constitutes a "public contract" regardless of whether the loans or grants are funded through local or federal moneys. Adv. Ops. No. 83-005, 84-011, and 85-002. See *State v. Lordi* (2000), 140 Ohio App.3d 561, 569, discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001). Therefore, the County's acquisition of economic development services through the establishment of wind-generated electricity in Lake Erie adjacent to the County is a public contract.

An interest prohibited under R.C. 2921.42 must be definite and direct and may be either financial or fiduciary in nature. Adv. Op. No. 81-003. The officers, chief administrative officials, or members of a board of a corporation have a fiduciary interest in the contracts of the corporation even if they are not compensated for their service. Adv. Ops. No. 92-004 and 96-005. The Ethics Commission held in Advisory Opinion No. 81-008 that public officials or employees who serve on a board of a nonprofit corporation have a definite and direct fiduciary interest in any contract between the corporation and their public agencies. See also Adv. Ops. No. 82-002, 83-010, and 84-001.

Public Official Serving on Nonprofit Organization's Board in Official Capacity

However, the Ethics Commission has held that R.C. 2921.42(A)(4) does not prohibit public officials from serving as fiduciaries of a nonprofit corporation if they serve in their "official capacities" as representatives of their public agencies. Adv. Ops. No. 83-010 and 84-001. The Ethics Commission has held that public officials who serve on the boards of directors of nonprofit corporations in their "official capacity" continue to pursue the interests of their public agencies as board members and do not have dual interests that conflict with, or distract them from serving, the public interest. Adv. Ops. No. 83-010, 84-001, and 93-012. See also 1979 Ohio Atty. Gen. Op. No. 79-005.

The Ethics Commission has held that public officials are deemed to serve in an "official capacity" when these four elements are established:

1. The public agency either creates or participates in the operation of the nonprofit corporation;
2. The public agency's governing body formally designates an agency official or employee to represent its interests as a member of the nonprofit board;
3. The public agency's governing body formally instructs the designated agency official or employee to represent its interests while serving on the nonprofit board; and
4. The designated agency official or employee agency *has no other conflicts of interest*. (Emphasis added).

Adv. Op. No. 84-010 and 96-005. See also 1991 Ohio Atty. Gen. Op. No. 91-007 (The Attorney General recognized the Ethics Commission's analysis of "official capacity" and stated that the Office would "embrace it wholeheartedly.").

Your letter explained that the Board of County Commissioners, with other public agencies has created and will participate in the operation of, the Corporation, and desires to formally designate the Prosecutor as its representative on the Corporation's Board of Directors and instruct him to represent the County's interests. However, as set forth above, the fourth criterion requires that the Prosecutor have no other conflicts of interest. As explained below, because of the statutorily mandated public duties of a county prosecutor, the Prosecutor will be unable to meet this requirement.

Duties of a County Prosecutor

R.C. 309.09(A) mandates that the county prosecutor serve as legal counsel for the board of county commissioners, board of elections, and other county officers and boards. The prosecuting attorney is responsible for providing legal opinions as required by any of these officials, and shall prosecute and defend all suits and actions involving any of these officials. *Id.*

No county officer can employ any other attorney or counsel, except as allowed by R.C. 305.14. Id.

The county prosecuting attorney also serves as the legal advisor for all township officers, boards, and commissions, unless the township has appointed a township law director. R.C. 309.09(B). The prosecuting attorney and the board of county commissions may also enter into contracts under which the prosecuting attorney provides legal services to a county park district, or joint fire, ambulance, emergency medical, or fire and ambulance districts in which the county participates. R.C. 309.09(D), (E), (F), (G), and (H).

The county prosecuting attorney has the authority to "inquire into the commission of crimes within the county" and shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party. R.C. 309.08(A) (there are some narrow exceptions for cases required to be prosecuted by special prosecutors, or the attorney general). The county prosecuting attorney is empowered to prosecute all other suits, matters, and controversies that he is required to prosecute, inside or outside the county, in the probate court, court of common pleas, and appeals court. Id. Upon conviction, the prosecuting attorney is responsible for causing execution to be issued for the costs, or costs and fine, and urge the collection of them. Id. In addition, R.C. 309.12 authorizes the county prosecutor to bring civil actions to recover misappropriated public funds. See also R.C. 309.13 (procedure for taxpayer lawsuit if the county prosecutor fails, upon the taxpayer's written request, to institute a civil action under R.C. 309.12). In order to perform all of these statutorily assigned tasks, the county prosecutor is responsible for appointing and setting the salary for all necessary assistant county prosecutors and other staff. R.C. 309.06(A).

As explained above, if the Prosecutor were to serve on the Corporation's Board of Directors in his official capacity, he would be required to represent the County's interests *as a Director*. However, the Prosecutor is also required to serve as legal counsel for the board of county commissioners and other county officers. The county prosecutor is required to perform the broad scope of statutorily assigned duties and authority of the office that are described above.

In the performance of these statutorily mandated duties, the Prosecutor is required to act with objectivity and independence of judgment. If he were to serve as a member of the board of directors of the Corporation, it would be impossible for him to maintain his objectivity and independence of judgment in matters that involve the Corporation.

The Ohio Attorney General Advisory reached a similar conclusion in a 1979 advisory opinion. 1979 Ohio Atty. Gen. Op. No. 79-055. In that opinion, the Attorney General addressed the issue of county employees and officials serving in their official capacities on the board of nonprofit corporations that the county commissioners created to act as a conduit for community development block grant funds. In that opinion, the Attorney General addressed the possibility of some county employees and officials being unable to serve on the board of a nonprofit corporation because of a conflict with their public duties. The Attorney General held:

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While I am of the opinion that selection of a county employee as trustee would not be improper by operation of law, many public employees are included among the class of public [sic] who have a duty to avoid private activity which is inconsistent with their official duties. See, e.g., R.C. 102.03; R.C. 102.04; R.C. 2921.42. For this reason, a county employee or official whose *public duties* would be in any way a check upon, or subordinate to, the functions performed by the non-profit corporation could not properly act as a trustee. (Emphasis added).

1979 Ohio Atty. Gen. Op. No. 79-055, at 2-186.

Because the Prosecutor would be faced with an irreconcilable conflict of interest if he were to serve on the Corporation's Board of Directors while also serving as the Prosecuting Attorney, he cannot meet the requirement that he have no other conflicts of interest. In certain situations, a public official or employee may be able to withdraw from consideration of matters as a public official or employee that could pose a conflict of interest. Adv. Ops. No. 89-006 and 89-010. However, some high-level public officials, such as independent elected office holders, are charged with unique authority from which they cannot withdraw. Adv. Op. No. 92-004. The prosecuting attorney is one of the officials unable to withdraw from matters by delegating them to subordinate employees within the office. Therefore, the Prosecutor cannot serve on the Corporation's Board of Directors in his official capacity.

Conclusion

As explained above, if the Prosecutor were to serve on the Corporation's Board of Directors, he would have an irreconcilable conflict of interest because he is required to act with objectivity and independence of judgment while performing his statutorily mandated public duties *as the County Prosecutor* on matters that affect the Corporation. Therefore, the Prosecutor cannot serve on the Corporation's Board of Directors.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 10, 2010. The opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney